1965

Earl Bonner v. George W. Sudbury and Mrs. George W. Sudbury, His Wife, and Beth L. Davis, et al. : Appellant's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

EARL BONNER
Plaintiff-Appellant,

vs.

GEORGE W. SUDBURY and MRS. GEORGE W. SUDBURY, his wife, and BETH L. DAVIS, ET AL,
Defendants-Respondents.

Case No. 10298

APPELLANT'S BRIEF

Appeal from the Judgment of the Third District Court for Salt Lake County, Utah
Honorable Ray Van Cott, Jr., Judge

LELAND S. McCULLOUGH
304 East First South
Salt Lake City, Utah
Attorney for Appellant

GALEN ROSS
731 East South Temple
Salt Lake City, Utah
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

IN THE SUPREME COURT
of the
STATE OF UTAH

EARL BONNER
Plaintiff-Appellant,
vs.
GEORGE W. SUDBURY and MRS. GEORGE W. SUDBURY, his wife, and BETH L. DAVIS, ET AL,
Defendants-Respondents.

Case No. 10298

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This was an action before the Third District Court, Salt Lake County, on the complaint of the plaintiff set forth in two counts:

(1) To quiet title to land in Salt Lake County, described as follows:

> Commencing 101 feet East of the Southwest corner of Lot 3, Block 13, Plat "F," Salt Lake City survey; running thence East 10 feet; North 180 feet; West 47 feet; North 150 feet; West 10 feet; South 165 feet; East 47 feet; South 165 feet, to beginning.

(2) An action against defendants George W.

Sudbury and Mrs. George W. Sudbury for trespass upon the property hereinabove described.

Defendants and respondents filed an answer and subsequently an amended answer and counterclaim, wherein defendants and respondents claimed an interest in the property described, to-wit: That said described property was a public street, dedicated to the public; that defendants and respondents were the owners of an easement in said described land which they had used openly, notoriously and under a claim of right for ingress and egress to their property, and on the counterclaim of defendants and respondents, defendants claim to be the owners of the described parcel of ground and sought to quiet title to said property in themselves.

DISPOSITION IN LOWER COURT

The issues were framed upon the complaint of the plaintiff in two counts:

(1) To quiet title in plaintiff to the described land.

(2) For trespass against the defendants for damages and on the amended answer and counterclaim of defendants and respondents.

The defendants set up as a defense that said described property was a public street and had been for over twenty-five years, and as such had been impliedly dedicated as a public street. Also, that defendants were the owners of an easement in said

described land which they had openly, notoriously and under a claim of right, used for ingress and egress to their property. On their counterclaim, defendants and respondents claimed to be the fee title owner to said property and sought to quiet title in themselves.

The court, upon defendant's motion, joined the Salt Lake City Corporation, Mrs. John J. Hunt, Zion's Security Corporation, Vere L. Mathews and Shirley Seeholzer, as third party defendants. Answers were filed by Vere L. Mathews, Shirley Seeholzer and Mrs. John J. Hunt, claiming a right of way in the described property by deed and at the pre-trial of this action, the court rules that Mrs. John J. Hunt, Vere L. Mathews and Shirley Seeholzer had acquired their title through George and Mary Paramore, which title included a right of way over the described property in question. As to these third party defendants, the action was dismissed. (R-30, 31) The pre-trial court, at that time, concluded that the only issues to be tried by the trial court were:

(1) Whether or not the plaintiff has fee title to the property in question.

(2) Whether or not the defendants have trespassed upon the plaintiff's property.

(3) Whether or not the described land in question has become a public street under and by virtue of the statutes of the State of Utah. (R-30)

No action was taken upon the rights of Zion's Security Corporation or Salt Lake City Corporation, and no adjudication was made as to their rights, and said third party defendants did not file an answer, although they were duly served with summons and a copy of the third party complaint. (R-20, 22)

The matter came on for hearing before the Honorable Ray Van Cott, Jr., at 10:00 o'clock A.M., on the 9th day of June, 1964, in the Third Judicial District Court, in and for Salt Lake County, State of Utah. The plaintiff introduced his evidence and witnesses and exhibits. The defendants introduced evidence, witnesses and exhibits. The court, after extended arguments and continuations, ruled on the 2nd day of November, 1964:

(1) That plaintiff's action be dismissed with prejudice on the grounds that there is no cause of action upon which relief can be granted in respect to the described property.

(2) That said property had been used for a period of ten years by the public, and as such, is dedicated as a public street. (R-35)

Motion for a new trial was filed by plaintiff on the 4th day of November, 1964. (R-36) On the 9th day of December, 1964, plaintiff's motion for a new trial was summarily denied by the court. (R-40) Notice of Appeal was filed by the plaintiff on the 7th day of January, 1965. (R-44)

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the lower court's judgment and that this court adjudicate:

(1) That based upon the undisputed evidence, plaintiff is the fee title holder of the following described property located in Salt Lake County, State of Utah:

Commencing 101 feet East of the Southwest corner of Lot 3, Block 13, Plat "F," Salt Lake City survey; running thence East 10 feet; thence North 180 feet; thence West 47 feet; thence South 15 feet; thence East 37 feet; thence South 165 feet, to the beginning.

(2) That this court adjudicate that defendants and respondents have no right, title or interest in and to the described property, either by conveyance or prescription.

(3) That this court adjudicate that said described property has not been dedicated as a public street pursuant to the statutes of the State of Utah, to-wit: 27-12-89, Utah Code Annotated, 1953, as amended by the laws of Utah, 1963. (formerly 27-1-2)

(4) That defendants and respondents are trespassers and have no right, title or interest of any nature in and to the property hereinabove described.

STATEMENT OF FACTS

It was stipulated in the record that the property in question is located in Lot 3, Block 13, Salt Lake City survey, and Exhibit No. 1, a County Plat of Block 13, Plat "F," was by stiplation admitted in evidence to show the location of the property in question located in Lot 3 of said Block 13. (R-53, 54)

Plaintiff called as his first witness, Robert L. Backman, a licensed attorney in the State of Utah, and also a registered abstracter in the State of Utah. (R-56) Mr. Backman testified that he was familiar with the right of way set forth in Lot 3 of Block 13, Salt Lake City survey; that he had examined the records on file in the County Recorder's Office to determine the fee title owner of the right of way. (-56) That fee title to the right of way in question was vested in Earl Bonner, the plaintiff. (R-57) Mr. Backman testified that the chain of title to the plaintiff, to the property in question, was as follows:

> "A. The patent to this property comes from the United States of America to Daniel H. Wells, as Mayor of Salt Lake City, in trust to the inhabitants of the City. It passed from Daniel H. Wells to George Paramore, I have shown as Entry two of abstract compiled by L. P. Backman, 25629 and then it passed from George Paramore to Mary Paramore, as shown at Entry three of the continuation of Thomas Olston, Licensed Abstractor. And

then passed from the heirs of Mary Paramore to Earl Bonner as shown on page 42 of the abstract. There is a decree of heirship on record determining that these people who had conveyed to Mr. Bonner are the heirs of Mary Paramore that died and that is shown on page 43 of the abstract that I have in my hand." (R-57)

At this point, Exhibit No. 8, the abstract, showing the chain of title to the plaintiff was, without objection, introduced and accepted in evidence. (R-57)

Exhibit No. 9 was, without objection, introduced and accepted in evidence, and shows the receipt of title by the defendants, George Wallace Sudbury and Sadie Watkins Surbury, his wife, and sets forth the legal description of the property they received by special warranty deed from the Home Owner's Loan Corporation. Said property is to the east of the right of way in question, as shown on Exhibit No. 1 and described as the plot belonging to George W. and Sadie W. Sudbury, to-wit:

> Commencing at the Southeast corner of Lot 3, Block 13, Plat "F," Salt Lake City survey; and running thence West 54 feet; thence North 165 feet; thence East 54 feet; thence South 165 feet, to the place of beginning.

Also, the third page of said Exhibit No. 9 shows the warranty deed whereby the defendant, Beth L. Davis, received title to the property shown on Exhibit No. 1, which is to the west of the right of way in question, and described as follows:

Commencing 64 feet west of the Southeast corner of Lot 3, Block 13, Plat "F," Salt Lake City survey, and running thence North 10 rods; thence West 47 feet; thence South 10 rods; thence East 47 feet, to the place of beginning. (R-58)

Mr. Backman testified on cross examination that his opinion as to the fee title of the property was based solely on the records in the County Recorder's Office; that he did not check any of the records in the old City Recorder's Office, nor in the City Engineer's Office, nor in the City Assessor's Office. (R-58, 59)

Mr. Orson Bonner was called as a witness and Exhibit Nos. 2, 3, 4, 5, 6 and 7, which are photographs of the right of way in question and the adjoining properties, were introduced and accepted into evidence without objection. Mr. Bonner testified that he had resided at what is known as 543 McClelland Street for twenty years. (R-61) That he had lived at this present place of residence for twenty years, and in this same area, for over forty years. (R-62) Mr. Bonner testified that Exhibit No. 5 showed the right of way in question, and the driveway which the defendant Sudbury had built, going off the right of way into the garage, and which driveway and garage Sudbury had built late in the Fall of 1962. (R-62) Mr. Bonner further testified that prior to 1962, that there was a fence on both sides of the right of way and that he, and the people in the back, or the north half of Lot 3,

had maintained this fence and right of way. (R-62) Mr. Bonner also testified, and on Exhibit No. 5 marked an "X" in ink, where a pole used to be maintaining the fence prior to the time that defendant Sudbury tore down the fence in order to construct a garage and driveway. (R-63) Mr. Bonner testified that during the forty years that he had lived in this Lot 3, or a portion of it, that the only people who had used the right of way, were the people who lived in the north half of Lot 3, who had a right of way given to them, service people and friends. (R-64, 68, 69) That the only people who had taken care of the right of way during the last forty years were himself and the people who lived in the back of the right of way. (R-64) They had placed a "road fill" in the right of way, they had oiled it; they had trimmed the shrubbery to keep it clear. That the fence on both sides of said right of way had been there for better than fifty years. (R-65) Mr. Bonner further testified that he had only seen defendant Beth L. Davis and defendants Sudbury use the right of way, prior to the time that Mr. Sudbury built his driveway and garage, on one occosion. That on that occasion, he went down and told Mr. Sudbury in a nice way not to use it and that settled it. That was approximately ten years ago. (R-65) That since 1962, when defendant Sudbury constructed his garage and driveway, that he had used the right of way to pull into his garage and get into his house. (R-65)

With respect to Exhibit No. 10, Mr. Bonner testified that the sign shown in this photograph "Positively No Trespassing At Any Time," was his sign. That he originally had one out in front and somebody had torn it down. That this present sign had been in its present location for over twenty years and that it was located approximately 175 feet up the road from Sixth South Street. (R-66) Mr. Bonner also testified that to his knowledge, plaintiff did not pay taxes on the right of way. That apparently it had not been assessed separately to Mr. Carl Bonner, the plaintiff, but he assumed that it had been assessed to all of the people in the north half of Lot 3 generally. (R-67) Mr. Bonner testified that he had not observed other people using the right of way, thinking it was a through street. (R-68, 69) That the city must have placed the street signs in front of the right of way, as shown in Exhibits Nos. 2 and 3. (R-69) Mr. Bonner further testified that the city asphalted a portion of the right of way, approximately 100 feet up the alley from Sixth South Street; and that they did not asphalt any other portion of the right of way. (R-70) Mr. Bonner further testified, upon questioning from the court, that the "Positively No Trespassing At Any Time" sign had been up approximately twenty years and was located approximately 180 feet back from Sixth South Street. (R-71) That prior thereto, there was another sign which was placed out on the front of the right of way on Sixth

South Street, which was up for five years prior to that, and which sign had on it, "Private Driveway." (R-71) Further Mr. Bonner testified that the right of way, or property in question, is not a through street and does not run through the block from Sixth South to Fifth South. (R-72)

Mrs. Orson Bonner was called to testify on behalf of plaintiff. She testified that she had resided at the residence known as 543 McClelland Street, which is in the north half of Lot 3, for over twenty years, and that she is the wife of Orson Bonner. That she was acquainted with the people who used the right of way off Sixth South Street (R-72), and identified them as Mrs. Seeholzer and Mrs. Mathews and Mrs. McKinney, their friends and service people. These people all reside in the north half of Lot 3. (R-72, 73) Further, Mrs. Bonner testified that prior to the time that defendants Sudbury constructed their driveway and garage, and pulled down the fence as shown in Exhibit No. 5, that she had only seen the Sudburys use the right of way on one occasion and on that occasion he was stopped and never used it again. That it was only after the Fall of 1962, after defendants Sudbury constructed their garage and driveway, that Beth Davis and the Sudburys commenced using the right of way. (R-73) Further, Mrs. Bonner testified that prior to the construction of defendant's garage and driveway, that said right of way had always been fenced on both sides. (R-73) Mrs. Bonner testified at R-74:

"A. Well the only people that I know that has come up there or been in the wrong place and come in, is people that were looking for McClelland at 8th South or Konetz Street and they have pulled in and asked me and they wanted Elizabeth Street or some little —"

Q. Well, in years past it has been quite frequent, hasn't it, Mrs. Bonner, that people come and try to get through?

A. Not that I know." (R-74)

Mrs. Bonner further testified that the people who come to the rear of the right of way are usually looking for someone who lives there. (R-75) Mrs. Bonner, on cross examination, testified that the street sign as shown in Exhibits Nos. 2 and 3 had been up about twenty years; that someone from the city attempted to take it down about twelve or thirteen years ago. That she had had a conversation with this gentleman from the city, and that this gentleman stated that the property belonged to Mr. Bonner and he was going to take the sign down, and Mrs. Bonner said:

> "If people come to see us and don't know there is a street there, how would they know where we live?" (R-76)

And the man from the city stated:

> "I will leave it up for identification purposes, but it is a private driveway." (R-76)

This occurred approximately five or six years ago. (R-76) Mrs. Bonner testified that the city does

not collect their garbage up the right of way; that they have to take it out to Sixth South Street (R-78)

Plaintiff called as a witness, Duane Davis. Mr. Davis testified that he was familiar with the right of way in question and that he had lived in the rear of Lot 3 at one time for about three years. (R-78) That this was about the middle of September, 1941, to the middle of August, 1944. That during this period of time he had occasion to see the people using the right of way and that the only ones he knew who used it were the ones who lived in the north of Lot 3 and the people who made deliveries and things like that. (R-78, 79) Further, that he did not see anybody else using the right of way and that said right of way was fenced at the time he was living there. (R-79) That he had neved seen the said right of way being used indiscriminately by the general public and that he had never seen Mr. and Mrs. Sudbury use the right of way. That the only time he saw their car, it was always parked on Sixth South Street in front of their place. Further, that he had never seen the defendant Beth Davis use the right of way. (R-79)

On cross examination, counsel for defendant Sudbury, at page 80 of the Record, attempted to confuse Mr. Davis by stating to him that the Sudburys did not purchase their property until August of 1946, intimating that Mr. Davis could not possibly have seen the Sudburys at this time. However,

at the time Mr. Sudbury testified, he corrected the Record and stated that he was living there during 1941 at the time Mr. Davis was living in the north half of Lot 3. (R-112, 113) Mr. Davis further testified that at the time he was living in the north half of Lot 3, that there was a street sign out in front which said "McClelland Street." That he received his mail there from the Post Office, and further, that he did not know who constructed the fence on either side of the right of way. (R-80) Further, Mr. Davis stated that he did not remember having seen any people come up the right of way, thinking it was a through street, or come up there by mistake. (R-81)

Vere L. Mathews was called as a witness for the plaintiff and testified that she lived in a house which is in the north half of Lot 3, and that she had lived there since September of 1948. That she was familiar with the right of way in question that leads from Sixth South Street. (R-82) Miss Mathews further testified that there was a fence up on both sides of said right of way from Sixth South up to her property, approximately 160 feet back from the street. (R-82) That she was familiar with the driveway and garage which Mr. Sudbury had constructed entering into the right of way. (R-82) That she was familiar with the people who had used the lane, to-wit, people who had come back to see Mrs. McKinney, Mrs. Hunt, the Bonners and mostly people who are servicing these places, such

as deliverymen delivering packages and papers. That she had never seen the public using the street for any other purposes. (R-83) That she had seen defendant Sudbury use the right of way on one occasion, in approximately 1955, when he drove in and backed out and broke the fence of one Mrs. Hanson, who was living there at that time. That this was prior to the time that he had a garage or driveway. That neither defendant Sudbury nor Beth Davis used the right of way permanently, but only on occasion. (R-83) That she had seen Beth Davis use the right of way perhaps three or four times. (R-84) Further, Miss Mathews testified that she had never seen people use the street thinking it was a through street; that after Mr. Sudbury broke down the fence, that a barrier was placed up there, which could only be moved with great effort. (R-84) The portion of fence that Mr. Sudbury broke down in 1955 was the picket fence which goes along defendant Davis' property, fronting on the right of way. (R-85)

Emmeline Cook was called as a witness and testified that she was familiar with the right of way in question; that she had lived there at one time in the north half of Lot 3, approximately seventy-one years ago, and that the right of way was their private property, quote:

" * our private alleyway for our property in the back there." (R-86) Further, that said right

of way was fenced on both sides and led back to the rear of Lot 3, up to her home. Further, she testified that she was born in the home to the east of the lane, which is occupied by defendant Sudbury, and that she had been acquainted with the people who resided in either of the homes on the east and west side of said right of way. (R-87) That she had never seen any of the people who resided in the homes on the east and west of the right of way use the right of way. (R-87, 88) Further, she testified that she had ceased to live in the north half of Lot 3 approximately sixty-two years ago. Further, Mrs. Cook testified that the general public, during the period of time that she was living there, never used this right of way. (R-88) That subsequent to her moving from this location, she had occasion to come back and visit her mother who was residing there. She had never heard of any actions on the part of the city to declare the right of way a public right of way in order to bring in sewage, garbage collections or things such as that. (R-89) Further, that she was never aware of any dedications to the public or surveys made by the city. (R-89) At page 89 of the Record, on cross examination, counsel for defendants stated:

> "Q. Were you acquainted — as I understand it from approximately 1915 to the present there have been some nine surveys made wherein the City determined that this was a public right of way at each one of these times. In fact it was a City

street. Were you acquainted with any of these surveys or were you present when any of these surveys were made?

A. No, I was not." (R-89)

Helen Hunt was called as a witness for plaintiff. She stated that she had lived in the north half of Lot 3 for approximately twenty-one years. That she was acquainted with the use of the right of way which leads to her property in the north of Lot 3; and that she had observed the fence on both sides of the right of way during this period of time, and that the people who used this right of way were the milk men, the postman, anybody giving service. (R-90) That she was acquainted with defendant Beth Davis, and defendants Sudbury. That she had seen Mr. Sudbury use the right of way years ago, shortly after she moved there. That defendants Sudbury opened up the hedge that was growing and started to use it, but they used it very little because her father had previously owned the property and had his attorney, Vernon Langlois, write them a letter and telephone them, and they stopped using the right of way. (R-91) That she had not seen them use it since except when Mr. Sudbury put in his garage and driveway, approximately two years ago. (R-92) She had not seen the general public using the area, because, quote:

> " * your average person, unless they live there, can't even drive out of there decently without knocking over somebody's fence." (R-92)

Upon cross examination, Mrs. Hunt testified that she had never seen individuals come up there thinking it was a through street. (R-92)

Roy Larsen was called as a witness for the plaintiff and he testified that he was familiar with the property in question and the right of way. That he lived in the rear of Lot 3 for approximately eight years subsequent to November of 1947. (R-93) That the right of way, during this period of time was fenced and closed on both sides during all of the period that he lived there, except for a period when there was an opening made in the hedge to the Sudbury lot, and that shortly thereafter, a pole was put in the middle of said opening to prevent it from being used into said right of way. (R-94) That he saw Mr. Sudbury use the right of way on the occasion when he broke the fence down, but this was the only occasion on which he had seen him use it. (R-94) That said right of way was generally only used for the residents in the north of Lot 3 for ingress and egress, and to deliver various things to them — milk, papers and such. (R-95) Mr. Larsen further testified on cross examination that he had only known of one occasion when somebody came in the right of way by mistake, and on that occasion the individual had walked in. That he had seen children on occasion cut through from Tenth East in the back yards and down through the right of way, going to school. (R-95) It was stipulated that if Mr. Larsen's wife were called to testify that her testi-

would be the same as Mr. Larsen's, her husband's.

Claude Wells was called as a witness who testified that he was acquainted with the right of way located in Lot 3; that he lived there at one time when he boarded with Mr. and Mrs. Hunt, between 1945 and 1946. That he had occasion to use the right of way in question. That it was fenced at that time. That he was not acquainted with either Mr. or Mrs. Sudbury or Miss Beth Davis. That generally, the people he saw using the right of way were the people who lived in the back and that he had never seen the general public traveling through there. (R-96, 97)

Shirley Seeholzer was called as a witness for the plaintiff and testified that she resided in the North half of Lot 3, and had been there since the Fall of 1948 to the present time. That she was acquainted with the right of way in question and that said right of way had been fenced on both sides since 1948 and she was acquainted with both Mr. and Mrs. Sudbury and Beth Davis. That during said period of time, that she had seen Mr. Sudbury or Beth Davis use the right of way one or two times. (R-98) That this was during the time when the fence was broken by Mr. Sudbury when he drove in and broke the fence on the Beth Davis side. (R-98) That generally people who used the right of way were people making deliveries to the residences in the rear and friends going to see them. (R-98, 99)

That it was only recently that defendants Davis and Sudbury used the right of way, and this was since Mr. Sudbury had put up his garage and driveway. (R-99) That she had never seen people going through the right of way thinking it was a through street. (R-99, 100)

Defendant called as his first witness, Paul Bay. Mr. Bay testifies that he lived at 1271 East 4130 South, Salt Lake City. That he was an engineer for Salt Lake City to install and supervise signs in general. Mr. Bay testified that the sign shown in Exhibit No. 3 is a city street sign. That he did not know when said street sign was installed. (R-100) Mr. Bay attempted to testify with respect to what the policy of Salt Lake City was in the installation of street signs, to which question, objection was made, and the court sustained the objection. (R-100, 101)

Defendant called Mr. Kenneth Yeates who testified that he was an engineer for the City Engineering Department and had been for seven years. Mr. Yeates was shown what had been identified as Exhibit No. 11, and he testified that this was an official survey of city blocks within Salt Lake City of this particular area. Mr. Yeates testified that with respect to said Exhibit No. 11, rights of way and public alleys, public rights of way and public alleys are shown on the maps of Salt Lake City in such a manner as to show whether or not the city, in some performance of the various types of work

that they do, can enter therein, and in describing this Exhibit No. 11, Mr. Yeates testified, at page R-103:

> "A. I don't like to volunteer information, but I would like to explain something here. I don't want to mislead anybody. First of all, rights of way and public alleys, public rights of way and public alleys are shown on our maps in such a manner as to show whether or not the City in some performance of the various types of work that they do, can enter therein. The City doesn't always denote the public but ninety percent of the time it does. Now in this particular case, this reflects an opening, the one that you asked about in particular, as being open to the public on this map." (R-103, 104)

Defendant offered Exhibit No. 11, and upon voir dire, Mr. Yeates testified that this Exhibit No. 11 or survey could indicate either a private right of way or public right of way. (R-105) The most that the Exhibit would show is that possibly the city would enter upon such property without fear of being prosecuted for trespass. (R-105)

Sarah W. McKinney was called as a witness by defendants. She stated that she lived at 546 McClelland Street. She stated that she had had occasion to see the general public, to-wit, children, using McClelland Street in front of her house, going to school, music lessons, to see friends, etc. That there had been some people drive up looking for addresses

or who had mistaken McClelland Street for a through street. (R-110, 111) She further stated that she had lived there almost eighteen years. That there had been a few instances "not too recently" when people had driven up in their automobiles in front of her house. (R-111, 113) The last such occurrence being several months ago. (R-112)

George W. Sudbury was called as a witness. Mr. Sudbury testified that he lived at 1035 East Sixth South, directly east of the right of way in question. That he moved to this location in 1940, which was contrary to the statement which defendant's counsel gave in cross examining one of plaintiff'5s witnesses —to the effect that Mr. Sudbury had not moved there until 1946. (R-112, 113) Mr. Sudbury testified that when he moved into the property, there was an old, partly dilapidated fence — cedar posts with wires stretched on it. That as soon as he could get to it, he built another fence with a cement base and steel poles and stretched a mesh wire along the fence on the posts. (R-113) Mr. Sudbury explained that over the years he had used the right of way, known as McClelland Street, to haul dirt in, to have coal delivered to his home, that the coal trucks went up the right of way to deliver coal. (R-113, 114) That when he converted to oil, the oil trucks went up the right of way to deliver the oil, which was some time in 1945 or 1946, which happened for about three or four years, and he then converted to gas. He further testified that he used

the right of way to deliver groceries to his home and to haul lumber in when he remodeled. That he remodeled his home shortly after he moved in — about 1942. (R-114) That he further used it for taking garbage out of the back of his house. (R-115) The court asked Mr. Sudbury if he ever kept his car in the backyard, and he answered at R-116:

> "No. Well, I did too for a period of time. I did my own car. Then the company bought the car for my use."

Further on, he testified that mostly he parked his car on the street, but on several occasions he had parked it over in the back lot. (R-117) When asked how long he had done this, he said over a period of five or six years, back prior to 1962. Further, in questioning Mr. Sudbury, he stated at R-117:

> "Q. Now you built the garage in 1961, is that correct?
>
> A. 1962.
>
> Q. Well, would it be fair to say that the five years that you parked your car, when you were in town, was prior to 1962?
>
> A. Prior to that, yes."

Mr. Sudbury testified that his abstract specifically stated that he had a right of way over the ground in question. (R-119) Mr. Sudbury further testified that before he built his garage, he investigated with the city and the City Attorney wrote a letter to the effect that he had a right to use the right of way. However, this letter was directed to

Beth Davis. (R-119, 120) It should be noted, however, that no such letter was introduced in evidence by the defendant. Again at R-121, Mr. Sudbury stated that he had a conveyance in his abstract giving him a right of way over the property in question. However, defendant did not produce his abstract to verify or prove such contention. Mr. Sudbury further testified that he had seen defendant Beth Davis use the right of way ever since she moved into the house approximately six or eight years ago. Mr. Sudbury further testified that he had seen a Mr. and Mrs. Hanson, the former occupants of the Davis house, use the right of way. (R-121) The court should note at this point that defendant Beth Davis did not even appear to testify in the action. (R-121, 122) Mr. Sudbury further testified that he had seen the Hansons, as well as Beth Davis, use the right of way to haul out rubbish and debris in remodeling their home. Further, Mr. Sudbury testified that he had seen the general public using McClelland Street on many occasions. (R-122) Particularly, where people would drive in looking for a certain address they could not find, or where children would go through there, from Tenth East to Fifth South, going to school, or people bringing in sewing and other jobs of that type to Mrs. McKinney, who lived in the back. (R-122, 123) Upon cross examination, Mr. Sudbury admitted that Mr. Bonner had placed a post in the spot where his driveway to his garage now stands and the same

had been placed there eight or nine years ago. (R-125)

Sarah W. McKinney was called by the defendant on redirect examination. Mrs. McKinney testified, when asked by the court if she had seen Mr. Sudbury drive his car up to the opening in the fence, she replied:

> "Oh, not once a week, because he hasn't been home."

Then she further qualified the statement that he had perhaps driven his car up there perhaps once a month. (R-126, 127)

Mrs. Bernessa Reynolds testified that she was the Assistant Superintendent in the Plat Department of the County Assessor's Office and that the right of way in question had not been assessed, as far as the records in her office showed. (R-128, 129) Mrs. Reynolds further testified that she did not know why the right of way had not been assessed, even though the abstract, Exhibit No. 8, showed that a deed had been recorded in 1951, showing title in the plaintiff to the right of way in question.

Mr. Guy Kidder was called as a witness for the defendant. He testified that he lived at 1044 East Sixth South Street, across the street from the right of way in question. That there never was a fence along the right of way, but only a ladder. That in the last ten years he had been over there frequently to borrow tools and help them in their yard

work. (R-133, 134) That on occasions he had seen Mr. Sudbury's car parked in his back yard over the past ten years. That he had seen children and the general public use the right of way. (R-134) Further, when asked to describe some of the instances of use, he stated:

> "A. Well there are a lot of people live back there that use it. I don't know all of them but there are four or five families and I think one family has at least two cars and possibly three. The milk trucks go in there, mail trucks, delivery trucks of various nature and quite frequently there is a large truck goes in there with boxes of some kind, I don't know what they are." (R-134)

On cross examination, when Mr. Kidder was asked how many times he had seen Mr. Sudbury's car in his back yard prior to the time he constructed his garage and driveway, he answered:

> "A. Not too frequently because he is not home very much.
>
> Q. Once every three or four months?
>
> A. At least that often." (R-136)

Mr. Kenneth L. Yeates was recalled as a witness by the defendants for redirect examination. The court, over the objections of counsel for plaintiff, received in evidence, Exhibit No. 11, which purported to be the 1915 Plat survey of Block 13. When asked to interpret this map, Mr. Yeates stated:

> "A. It shows that the plot of ground bounded

by 5th and 6th South Streets and 10th and 11th East Streets and in there is Koneta Court, and what appears to be on the basis of this plat a public alley, right of way or street, on the basis of this plat." (R-137)

Mr. Yeates also testified that the city formerly performed private surveys for citizens. That the surveys as set forth on the Exhibit No. 11 were requests for surveys which were performed as private surveys at that time. (R-137, 138) That further, these surveys were paid for by private citizens. (R-138) Mr. Yeates further testified with respect to Exhibit No. 12:

"A. This card is a result of an action by the City.

Q. Wherein they accepted enmass various streets and rights of way as public entry for the purpose of performing garbage services, sewer services and a multitude of other public services?" (R-138, 139)

On cross examination, Mr. Yeates, when asked in respect to Exhibit No. 12, because it states "public" on McClelland Street, whether or not this is true. Mr. Yeates said he did not know (R-139), that this was for the purpose of garbage collection. (R-139)

Mr. Orson Bonner was recalled as a witness by the plaintiff. Mr. Bonner testified that he had heard the testimony of Mr. Sudbury to the effect that he had coal deliveries to his home and that the coal

trucks came up this right of way. When asked where the coal chute was located in Mr. Sudbury's home, Mr. Bonner testified that the coal chute, or coal shed, was on the opposite, or east, side of Mr. Sudbury's home, from the right of way, and that he had never seen any coal trucks come up the right of way to deliver coal to Mr. Sudbury's home. This, defendant, never denied. (R-141, 142) Mr. Bonner testified that he had seen but one oil truck come up the right of way; then it pulled out and went into the street and drew the hose up over the lawn to deliver oil. (R-142) Further, Mr. Bonner testified that this area where Mr. Sudbury built his driveway into his garage was formerly a rock garden and a hedge, which used to come up to the end of his garage. That there was some type of a ladder for a fence along there and a post. That he had only seen Mr. Sudbury drive his car in this opening, on one occasion, where his driveway is, prior to the time of the construction of the driveway and garage, and this was the occasion on which he had knocked the fence down across the alley. (R-143) That he had seen Mr. Sudbury unload groceries through this supposed opening on one occasion. (R-143)

It was stipulated between counsel and accepted by the court, that if Mrs. Bonner and Mrs. Mathews were called to testify on rebuttal, that their testimony would be to the same effect as Mr. Bonner's.

At this point, both plaintiff and defendant rested.

ARGUMENT

THE UNDISPUTED EVIDENCE PROVES THAT THE TITLE TO THE RIGHT OF WAY DESCRIBED AS FOLLOWS IS IN THE PLAINTIFF:

> Commencing 101 feet East of the Southwest corner of Lot 3, Block 13, Plat "F," Salt Lake City survey, running thence East 10 feet; thence North 180 feet; West 47 feet; South 15 feet; East 37 feet; South 165 feet, to the beginning.

Based upon the testimony of Robert Backman, a licensed attorney and registered abstracter, and the abstract, Exhibit No. 9, which was, without objection, received in evidence, title to the above described land rests in fee simple in the plaintiff.

The defendant did not attempt to dispute the chain of title or conveyances whereby the plaintiff received title to the property in question. Pursuant to the provisions of Section 1-1-15, Utah Code Annotated, 1953, as amended, the abstract is prima facie evidence of title to the property in question.

Section 1-1-15, Utah Code Annotated, 1953, as amended, provides:

> "ABSTRACTS PRIMA FACIE EVIDENCE. — Any abstract of title certified to be true and correct by any abstracter holding a valid and subsisting certificate of authority from the board, as herein provided, or by any county recorder, shall be received by the courts of this state as prima facie evidence of its contents under such rules and regulations as to procedure as such courts may promulgate."

POINT II

THE UNDISPUTED EVIDENCE PROVES THAT THE DEFENDANTS HAD NO RIGHT, EITHER BY PRESCRIPTION OR BY DEED OF GRANT OR EASEMENT TO THE PROPERTY DESCRIBED IN POINT I.

The defendants' only evidence to prove that defendant Sudbury had an interest in the property in question, was his statement in the record to the effect that "his abstract showed he had a right of way over the property" in dispute. However, it should be noted that defendant did not produce an abstract or any evidence to show chain of title, either by conveyance or deed of any nature that would have given him a right of way. Plaintiff, pursuant to Exhibit No. 9, and the testimony of Mr. Robert Backman, proved that when defendants Sudbury and defendant Beth Davis received title to the property which they own, to the east and to the west of the right of way, that neither received a right of way over said property in question.

Further, with respect to a prescriptive right, neither of the defendants, Sudbury nor Davis, introduced any evidence which would indicate, let alone prove, that they had over the prescribed period of time obtained any prescriptive right to the property in question by either a use for twenty-one years adverse to the plaintiff or adverse use or possession in any manner whatsoever. (See the following authorities.)

This court, in the case of *Morris v. Blunt, et al.*

49 Utah 243, at page 252, 253, 161 P. 1127, stated:

"A prescriptive right to an easement does not arise in seven years, by analogy to the provision of the statute barring an action to recover real property when the person asserting title was not seized or possessed of the property in question within seven years. These statutes do not apply to rights of way or any other class of easements by prescription. The right by prescription can only arise by adverse use and enjoyment under claim of right uninterrupted and continuous for a period of twenty years. * * *"

"* * * Under the well established rule, the use, in order that it may ripen into a prescriptive title, must, in any case, not only be adverse and continuous, and under claim of right for a period of twenty years, but it must be uninterrupted throughout that period. In the case at bar the use of the defendants and their predecessors commenced in 1887, at which time there was a severance of the title to the parcels of land, and could not ripen into title by prescription until 1907. But defendant's own testimony shows that the plaintiff plowed the road in question as early as 1904, and from that time to the commencement of this action, the plaintiff, from time to time, placed rocks in the road, from the plowed land adjoining, and that the defendants, with shovels, leveled the ground and removed the rocks to the north to make the road passable; and following these acts, and clearly indicating the attitude of each of the parties to this suit to the claim of the defendants to the ownership of this right of way at about the time the twenty-year period

> would have expired, plaintiff placed a wi[re] gate across the road at the point where [he] left the public highway, and the defendan[ts] cut it down. From these circumstances w[e] conclude that the use was not uninterrupted, and that no right by prescription could aris[e] from these circumstances. * * *"

This court, in the case of *Big Cottonwood Tan-ner Ditch Company v. Moyle, et al,* 109 Utah 21[3], page 242, 174 P.2d 148, held that prescriptive right[s] are founded upon adverse possession and not upon presumed grants. See *Harkness v. Woodmansee,* [7] Utah 227, 26 P. 291; *Yeager v. Woodruff,* 17 Utah 361, 53 P. 1045; *Coleman v. Hines,* 24 Utah 360, 67 P. 1122; *Morris v. Blunt,* 49 Utah 243, 161 P. 1127; *Bolton v. Murphy,* 41 Utah 591, 127 P. 335; *Farr, et al, v. Wheelwright Construction Company,* 49 Utah 274, 163 P. 256.

This court, in *Harkness v. Woodmansee,* (cited Supra) stated at page 231:

> "The statute does not, in effect, presume a grant and give the person relying upon it the title from seven years' possession alone. The presumption is made from the fact that the land was held adversely; and to make the holding adverse the land must have been protected by a substantial enclosure, or it must have been usually cultivated or improved, or labor or money must have been expended to irrigate it, amounting to the sum of Five Dollars per acre. And in either case the occupation and claim must have been continuous for the seven years, and during that time the

claimant, his predecessors or grantors, must have paid all taxes levied and assessed upon the land according to law. This statute does not apply to rights of way or any other class of easement by prescription. It can only be applied by analogy. The plaintiffs' use and enjoyment of the land in dispute, or the facts attending the same, were not such as the statute above quoted required, or their equivalent; hence a prescriptive right cannot arise in favor of the plaintiffs therefrom by analogy thereto. It is conceded that the use and enjoyment, such as it was, was for less than twenty years, so that period of limitation cannot apply. The evidence in the record proves that defendant was using the strip of land in dispute as a way to the rear of his own building, that he had gates on it a part of the time; that he maintained a platform on the side next to his building a large portion of the time, which occupied three or four feet of the way; and that his tenant was accustomed to keep a team standing south of the platform, and at such times the entire way was occupied thereby; that defendant also had a privy on the ground a portion of the time. The evidence tends to establish that the plaintiffs' use was simply permissive, and that defendant was not aware that plaintiffs were using his land under a claim of right. *Where a person opens a way for the use of his own premises, and another person uses it also without causing damage, the presumption is, in the absence of evidence to the contrary, that such use by the latter was permissive, and not under a claim of right.*"

This court, in the case of *Melvina Coleman v.*

Edmund G. Hines, (cited Supra) stated at page 364:

> "Where a party relies upon his title as obtained by prescription, he must allege the facts showing the existence of the right, or plead the prescriptive right, averring that its existence was under a claim of right, was peaceable, without interruption, and open, notorious, and exclusive."

This court, in the case of *Farr, et al, v. Wheelwright Construction Company,* (cited Supra) stated at page 277:

> "It should require no argument, however, to show that where one claims an easement over real property he should set forth his claim in apt terms in his pleading. In our judgment, the allegations in the complaint are clearly insufficient to constitute a right to the use of the strip of ground in question under the claim of dedication. Respondents' counsel, at the trial, however, disclaimed that he had pleaded dedication. When the question of the admission of certain evidence came up, he said:
>
> > " 'We are not pleading dedication; we are pleading useage. * * * We claim the right by use, just as we have pleaded it and proven it.'
>
> "In his brief he nevertheless relies upon dedicatio nand explains that what was meant by the foregoing statement was that he had not pleaded and was not relying upon dedication by record, or an express dedication. But even though that be conceded, that it was just as necessary for counsel to plead an implied dedication as it was to plead an express grant to that effect."

POINT III

THE COURT ERRED IN HOLDING THAT THE RIGHT OF WAY IN QUESTION AND DESCRIBED IN POINT I HAD BEEN DEDICATED FOR PUBLIC USE PURSUANT TO THE PROVISIONS OF 27-12-89, UTAH CODE ANNOTATED, 1953, AS AMENDED BY THE LAWS OF UTAH IN 1963. (FORMERLY 27-1-2)

The only basis upon which defendants seriously claim any right to use the right of way in question is the basis the court erroneously used in determining that the plaintiff had no cause of action against the defendants, to-wit: That the property in question had been deeded to the public pursuant to the provisions of Section 27-12-89, Utah Code Annotated, 1953, as amended by the laws of Utah, 1963. (formerly 27-1-2) In this respect, the following citations should be noted:

Section 27-12-89, Utah Code Annotated, as amended by the laws of Utah, 1963, (formerly 27-1-2) provides:

> "PUBLIC USE CONSTITUTING DEDICATION. — A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."

This section of the code was derived from the laws of 1886, Chapter 12, Paragraph 2, and has been an integral part of law in the state of Utah since said date.

In the case of *Thompson, et al, v. Nelson, et al,*

2 Utah 2d 340, 273 P.2d 720 (1950), this co... stated at page 345:

> "We quote with approval the definition ... 'thoroughfare' from our case entitled, Morr... v. Blunt, 49 Utah 243, 249, 161 P. 1127, 1131:
>
> > " 'A "thoroughfare" is a place or wa... through which there is passing or trave... It becomes a "public thoroughfare" when the public have a general right of pass... age. Under this statute the highway, even though it be over privately owne... ground, will be deemed dedicated or ab... andoned to the public use when the public has continuously used it as a thorough... fare for a period of ten years, but such use must be by the public. Use under private right is not sufficient. *If th... thoroughfare is laid out or used as a private way, its use, however long, as a private way does not make it a public way; and the mere fact that the public also make use of it, without objection from the owner of the land, will not make it a public way. Before it becomes public in character the owner of the land must consent to the change.* Elliott, Roads and
>
> Streets, No. 5.' "

Further, at page 345, the court stated:

> "The trial court correctly regarded the evid... ence as insufficient to establish use sufficient to meet the requirements of Section 27-1-2... Utah Code Annotated above quoted. The road entered from Jail Alley over a private right

of way, reserved as such by the owner for more than fifty years. So far as we can determine from the evidence, the road terminated back of the appellant's theatre on its private property. The road led to no place of public interest and ended in a cul-de-sac. The use made of the road was for delivering merchandise and supplies and for parking to the rear of buildings on Main Street in connection with the few business houses on Main Street in the half block over which the road extends. All of the business houses except one owned by the Nelson defendants and two owned by appellant had a private, reserved, right of way to their respective properties.

> " 'The mere use by the public or a private alley in common with the owners of the alley does not show a dedication thereof to public use, or vest any right in the public to the way.' MacCorckle v. City of Charleston, 105 W. Va. 395, 142 S.E. 841, 58 A.L.R. 231 and Annotation."

In the case of *Clark, et al, v. Erekson, et al,* 9 Utah 2d 212, 341 P. 2d 424 (1959), this court held that there was sufficient evidence to support the trial court's finding that a lane on property was a public road and a finding as to its width. The court stated at page 213:

> "It is appellants' contention that the evidence fails to support the court's finding that Erekson's Lane is a public road and that it is 50 feet wide in part and 40 feet wide in part. We do not agree."

The court, further, at page 213, stated:

"The court as the trier of the facts found that a lane known as Erekson's Lane is a public road extending from Vine Street south to 59th South which meanders along an irregular route, and that the west and east boundary lines of the parties to this action abutted this road. The court further found that this road as it passes the north boundary of appellants' property is 50 feet wide for a distance of 40 feet and then narrows to only a width of 40 feet for the remainder of the distance in dispute. The court also found that for approximately 30 years appellants and their predecessors in interest had encroached upon this public road by placing fences, buildings, trees and shrubberies thereon. The court thereupon entered a decree quiteing appellants' title except to the public road described above abutting their west boundary line and ordered appellants to remove the encroachments thereon."

In this particular case, there were witnesses who could remember back to 1890, that Erekson's Lane had been used by the general public, either walking or riding in wagons and later in automobiles and had been constantly used by people either going to church or to fish in Little Cottonwood Creek. There was no evidence that permission was sought or given by anyone to use this road. On the contrary, the abstracts of title of the properties of the parties to the suit showed that even before patent issued by the United States in deeds given by their predecessors in interest, the beginning points of the properties conveyed were described as being in the cor-

of a north and south country road. The court held this evidence sufficient to establish a dedication of the road by user under the provisions of Section 27-1-2, Utah Code Annotated, 1953. Further, the court held there was no merit to the appellant's contention that there was insufficient evidence to support the finding as to the width of the road. A seventy-year-old witness had testified that he had lived in the neighborhood practically all of his life, could remember from about 1890, that as he came from 59th South to Erekson's Lane, that Erekson's Lane was a least fifty feet wide from the creek all the way north to Vine Street. Also, the evidence was uncontradicted that the garage, trees, shrubberies and fences were not placed in their present location until approximately thirty years before the commencement of this action and long after Erekson's Lane was dedicated as a public highway by user.

In the case of *Morris v. Blunt, et al,* 49 Utah 243, 161 P. 1127 (1916), the court, at page 249, stated:

> "A dedication rests primarily in the intent of the owner. There must be a concession intentionally made by him, which may be proved by declarations or by acts, or may be inferred from circumstances. No form or ceremony is necessary. It must, however, appear that he knew of the use by the public, and intended to grant the right of way to the public. No formal acceptance by any public officer or

agent is necessary, but there must be acc
use by the public. * * * Quotations cite

Further, at page 249, the court stated:

"From the evidence, it appears that the pla
tiff, two years before the commencement
this action, plowed the road to the canal ban
that frequently in plowing lands adjoinin
the road plaintiff rolled boulders from t
land into the road, which the defendants re
moved before they could travel the road; tha
plaintiff closed the road extending west fro
the Kersey crossing five years before the co
mencement of this action; that a wire ga
was placed by the plaintiff across the en
trance to the road on the east section li
seven years before the commencement of th
action; and that the road was plowed by th
plaintiff as much as ten years before the co
mencement of this action.

"All these facts negative an intention on th
part of the plaintiff to dedicate to public us
On the contrary, the fair inference to b
drawn from them is that he intended not t
dedicate the roadway to the public. It is tru
that, a dedication by the owner and an accep
ance by the public once made, the highwa
thus established continues to be a highway a
long as the public use continues; and if in th
case the public use were sufficient to consti
tute an acceptance and the owner had in fa
intended to dedicate, then the dedicatio
would be complete; but we think there is n
evidence tending to show that there ever wa
an intent to dedicate to public use."

Again, at page 250, the court stated:

"Next we must consider the people who used this road. Did their traveling upon it constitute a use by the public? The evidence discloses three classes of persons only who used this road, to wit, the occupants of the Kersey place and their visitors, the workmen upon the canal, and some persons who lived in the middle of the section.

"As to the occupants of the Kersey place, they had an express grant of a right of way for ingress and egress contained in their title deed (not considering now the extent or limitation of the right conveyed in the deed), so they were not traveling the road by reason of its public character, but under the express provision of their deed.

"As to the workmen upon the canal, they were there under the right by 'user' claimed by their company. The right of way for their canal, whatever it is, if it authorizes the occupancy of the land for canal purposes, carries with it the right, under reasonable limitations to enter the premises to construct, repair, and operate the canal, its headgates, its laterals, etc., which are a part of or connected therewith. So these persons were not on this road by reason of its public character, but under whatever right by 'user' the canal company had over this land for canal purposes."

In the case of *Schettler v. Lynch,* 23 Utah 305, 64 P. 955, a dispute arose as to a twelve foot strip of ground alongside a street and whether or not it had been dedicated to the public. The court, in its opinion held that there had been a dedication in view of the fact that the owner of the ground had

built a fence to enclose his land, leaving the twelve foot strip as a part of the street, and that the fence had remained there during his lifetime and at the time of the trial some of the posts were still standing. Further, after the fence was built, a sign was placed on the owner's house on which the street was designated "Church Street," and the owner permitted it to remain there as an index to a public street and acquiesced in the use of the land by the public as a street. Further, the fact that the owner was aware that people were building homes fronting on the street, were using the street and the twelve foot strip as a highway; that he had permitted the twelve foot strip to be used in common with the other portions of the street for traffic and teams without interference. The court held that thus his conduct and acts were calculated to induce the people to believe that the land was devoted to the purpose of a street and to lull them into security as to any rights they might acquire with reference thereto. As a result of all of this, about twenty houses with people living in them, were fronting on the street. The court holding that the intention of the owner being unequivocally manifested by his conduct and acts. Further, the court found that the strip of land was necessary for the convenience and accommodation of the public and that without it the street would have been but one and one-half rods wide, and would not have been of sufficient width to permit teams to turn around. The court stated at page 313:

"To determine the question here presented it is, in the first instance, important to refer to the principles of law involved, and then ascertain whether, in the light of those principles, the evidence established valid dedication, A dedication may be either express or implied. It is express when there is an express manifestation, on the part of the owner, of his purpose to devote the land to the particular public use, as in the case of a grant evidenced by writing. It is implied when the acts and conduct of the owner clearly manifest an intention on his part to devote the land to the public use. Whether the dedication be express or implied, an intention of the owner to appropriate the land to the public use must appear. It is always a question of intention. In neither case is any particular formality or form of words necessary. If the intention to dedicate is manifest it is sufficient. An implied dedication is founded on the doctrine of equitable estoppel, and when land has been thus set apart as a highway for the use of the public, for their convenience and accommodation, and enjoyed as such, and private and individual rights acquired in relation to it, 'The law,' as said by the Supreme Court of the United States, 'considers it in the nature of an estoppel in pais, which precludes the original owner from revoking such dedication.' "

Further, at page 313, the court stated:

" 'The intent which the law means is not a secret one, but is that which is expressd in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as

would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation. Regard is to be had to the character and effect of the open and known acts, and not to any latent or hidden purpose. If the open and known acts are of such a character as to induce the belief that the owner intended to dedicate the way to public use, and the public and individuals act upon such conduct, proceed as if there had been in fact a dedication, and acquire rights which would be lost if the owner were allowed to reclaim the land, then the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intent.' Elliott on Roads and Streets, pages 92, 93."

At page 314, the court stated, quoting from *Wilson v. Hull*, 7 Utah 90:

" 'The intention of the owner of the land to dedicate may be inferred from his acquiescence in its continual use as a road by the public. In order to constitute acquiescence in a legal sense, the owner must know that the public is using his land as a road. There must be an act of the mind, a knowledge that the public is using the land as a highway, and a purpose on the part of the owner not to object. A knowledge of the use for such a purpose, without objection by word or act, may authorize the inference that the owner consents to the appropriation.' "

This court, in the case of *Bamberger Electric Railroad Company, et al, v. Public Utilities Commission*

... of Utah, 59 Utah 351, 204 P. 314, stated at page 365:

> "A mere permissive use of a private road by the general public, however long contineud, will not make it a public highway."
>
> "While it may be that an individual, under certai ncircumstances, by long and continued use, may acquire some rights to use the private roads, that, however, would not make the road a public road or highway. * * *"

American Law of Property, Volume II, Page 483, 484, Paragraph C. Prescription, provides:

> "In order for the prescriptive period to be running in favor of the public, the use must be general and not limited to a few specific individuals. It has been said that the test of a public use is not the frequency of the use or the number using the way, but its use by persons who are not separable from the public generally. Likewise the use must be substantially along one line of way and not spread out over a large area. Futrher, the acts must be such as to impute notice to the owner of the land of the adverse character of the use."

At page 484:

> "The use must be adverse as distinguished from permissive in order for prescription to be running. Thus, a use by the public of a private way already laid out by the landowner does not become adverse because of the failure of the landowner to protest for a long period. Such a use is no evidence of a claim of right in the public."

The facts, undisputed, in this case show a private right of way established, as such, as early as

72 years ago, fenced during all of said period, leading to the north of lot 3 to private homes, all of which by deed were entitled to use the right of way. The right of way was not a through street but ended on private ground, used by the people who resided there and the necessary service people, friends, etc.

The owners of the fee never acquiesced in the general use by the public. Except for a portion of the right of way that was apparently asphalted by the city by mistake, maintenance was solely by the owners.

The right of way being ten feet wide for the majority of its length is entirely unsuited for a public street of any kind. The efforts on the part of the owners to restrict the use of the right of way to those entitled thereto expresses an obvious intention that a dedication was never intended, express or implied, and never acquiesced in.

The minimal use by others of the right of way does not constitute a dedication.

Respectfully submitted,

LELAND S. McCULLOUGH
304 East First South
Salt Lake City, Utah
Attorney for Appellant